

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 33

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HEINRICH BAUST and GUIDO WAESCHENBACH

Appeal No. 95-3608
Application 07/960,420¹

HEARD: January 12, 1999

Before WINTERS, WILLIAM F. SMITH and LORIN, Administrative Patent Judges.

WINTERS, Administrative Patent Judge.

DECISION ON APPEAL

This appeal was taken from the examiner's decision rejecting claims 1 through 3 and 5 through 14, which are all of the claims remaining in the application.

¹Application for patent filed December 3, 1992.

Claims 1 and 10 are representative.

1. A shower gel and hair shampoo composition comprising a neutralized tenside combination of alkyl polyglycol ether-carboxylate, fatty alcohol ether-sulfate and fatty acid amidopropyl-betaine, wherein the alkyl polyglycol ether-carboxylic acid used has the general formula I



in which R denotes a straight-chain alkyl group having 8-20 carbon atoms and n denotes on average 2 to 5, and wherein the ratio of fatty alcohol ether-sulfate to alkyl polyglycol ether-carboxylate is 1:0.25 to 1.5, and that of fatty alcohol ether-sulfate to fatty acid amidopropyl-betaine is 1:0.15 to 1.0.

10. A shower gel and hair shampoo composition comprising:

a) a viscous, aqueous solution of a neutralized surfactant combination of alkyl polyglycol ether-carboxylate, fatty alcohol ether-sulfate and fatty acid amidopropyl-betaine, wherein the alkyl polyglycol ether-carboxylic acid used has the general formula I



in which R denotes a straight-chain alkyl group having 8-20 carbon atoms and n denotes on average 2 to 5, and is present in an amount of about 2-5% by weight, the fatty alcohol ether-sulfate is present in an amount of 2-7% by weight, the fatty acid amidopropyl-betaine is present in an amount of 1-3% by weight, and the total concentration of tensides is less than 10% by weight; and

b) electrolyte salts which are present in an amount of 2-10% by weight, wherein the

Appeal No. 95-3608
Application 07/960,420

composition is prepared without addition of
thickeners.

The references relied on by the examiner are:

Koch et al. (Koch)	4,148,762	Apr. 10, 1979
Desai	4,490,355	Dec. 25, 1984
Ploog et al. (Ploog)	4,670,253	Jun. 02, 1987
Ritter et al. (Ritter)	4,900,544	Feb. 13, 1990

In the examiner's answer (paper no. 13), page 5, the examiner entered a new ground of rejection of appellants' claims predicated on the enablement requirement of 35 USC § 112, first paragraph. That rejection, however, was withdrawn in the supplemental answer (paper no. 17), page 1. The issue remaining for review is whether the examiner erred in rejecting claims 1 through 3 and 5 through 14 under 35 USC § 103 as unpatentable over "Ploog or Ritter in view of Koch and Desai" (examiner's answer, paper no. 13, page 3).

Opinion

On consideration of the record, including the main brief, the reply brief, the first and second supplemental reply briefs, the examiner's answer, and the first and second supplemental answers, we reverse the rejection under 35 USC §

103.

We have no doubt that the prior art could be modified in the manner proposed by the examiner to arrive at appellants' shower

gel and hair shampoo composition comprising the specific combination of surfactants in the specific proportions or amounts recited in independent claims 1 and 10. This is apparent from a review of the instant specification. However, the mere fact that the prior art could be so modified would not have made the modification obvious unless the prior art suggested the desirability of the modification. In re Gordon, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984).

Here, we find no direction or guidance in the prior art which would have led persons having ordinary skill to a composition comprising the specific combination of surfactants in the proportions or amounts set forth in appellants' claims. The examiner has not established that the prior art suggests the desirability of combining those surfactants in those amounts. On the contrary, in the specification, appellants

Appeal No. 95-3608
Application 07/960,420

)	
)	BOARD OF PATENT
WILLIAM F. SMITH)	APPEALS AND
Administrative Patent Judge)	INTERFERENCES
)	
)	
HUBERT C. LORIN)	
Administrative Patent Judge)	

vsh

Appeal No. 95-3608
Application 07/960,420

Foley & Lardner
P.O. Box 299
Alexandria, VA 22313-0299